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Taylor v. Chamberlain Respondent's Brief 3 Dckt. 39378

IN THE SUPREME COURT OF THE STATE OF IDAHO

THOMAS R. TAYLOR, an individual, Plaintiff/Appellant, vs. DAVID CHAMERLAIN, D.O., an individual; JOHN JACOBS, M.D., an individual; EASTERN IDAHO HEALTH SERVICES, INC., an Idaho corporation d/b/a EASTERN IDAHO REGIONAL MEDICAL CENTER, Defendants/Respondents.	)	Supreme Court Docket No.: 39378 Bonneville County Case No.: CV-2011-303

RESPONDENT EASTERN IDAHO HEALTH SERVICES, INC. D/B/A EASTERN IDAHO REGIONAL MEDICAL CENTER'S BRIEF ON APPEAL

Appeal from the District Court of the Seventh Judicial District of the State of Idaho in and for the County of Bonneville, Honorable Jon J. Shindurling, District Judge, Presiding

For Defendant/Respondent Eastern Idaho Health Services, Inc. d/b/a/ Eastern Idaho Regional Medical Center:

Marvin M. Smith
Marvin K. Smith
Smith & Banks, PLLC
591 Park Avenue, Suite 202
Idaho Falls, ID 83402

For Defendant/Respondent David Chamberlain, D.O.:

J. Michael Wheiler
Thomsen Stephens Law Office, PLLC
2635 Channing Way
Idaho Falls, ID 83404

For Plaintiff/Appellant:

Reed W. Larsen
Javier L. Gabiola
Cooper & Larsen, Chartered
P.O. Box 4229
Pocatello, ID 83205-4229

David M. Kono
Daniel K. Brough
Bennett Tueller Johnson & Deere
3165 East Millrock Drive, Suite 500
Salt Lake City, UT 84121

For Defendant/Respondent John Jacobs, M.D.:

Gregory Calder
Beard St. Clair Gaffney
2105 Coronado Street
Idaho Falls, ID 83404

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is a medical negligence case wherein Thomas R. Taylor ("Plaintiff") failed to serve the summons and complaint upon Eastern Idaho Health Services, Inc. d/b/a Eastern Idaho Regional Medical Center ("EIRMC") within six (6) months of filing his complaint.

B. Course of Proceedings

On January 20, 2011 Plaintiff filed a medical negligence action in Bonneville County, Idaho naming EIRMC as a defendant. R., pp. 7-17. On August 16, 2011 EIRMC filed its Motion to Dismiss and supporting memorandum and affidavit. R., pp. 21-34. Plaintiff filed a motion and response to EIRMC's Motion to Dismiss on August 24, 2011. R., pp. 36-48. EIRMC filed its reply in support of motion to dismiss and opposition to Plaintiff's motion on August 26, 2011. R., pp. 75-91. The district court heard EIRMC's Motion to Dismiss on August 30, 2011 and briefly on September 27, 2011 during Dr. Chamberlain's Motion to Dismiss hearing. Tr., pp. 6-68. The district court granted EIRMC's and Dr. Chamberlain's Motion to Dismiss and denied Plaintiff's Cross-Motion to Stay Case *Nunc Pro Tunc* or, alternatively to Enlarge Time to Serve Defendants in its September 29, 2011 Opinion and Order on Plaintiff's Motion to Retain and Cross-Motion to Stay Case *Nunc Pro Tunc* or, alternatively, to Enlarge Time to Serve Defendants. R., pp. 134-143.

On October 3, 2011 the district court entered a Judgment of Dismissal Without Prejudice dismissing EIRMC and Dr. Chamberlain without prejudice from the action. R., pp. 144-145. Plaintiff filed a Notice of Appeal on November 14, 2011. R., pp. 146-150. The district court

filed an Amended Judgment on December 19, 2011 dismissing EIRMC, Dr. Chamberlain, Russ Rowberry, RNFA, Dr. Jacobs, Dr. Bhakta, Dr. Ontiveros, and IHC Health Services, Inc., d/b/a Cassia Regional Medical Center from the matter without prejudice. R., pp. 151-152. Plaintiff filed an Amended Notice of Appeal on January 30, 2012 and a Second Amended Notice of Appeal on February 23, 2012. R., pp. 155-159; 166-170.

C. Statement of Facts

On January 20, 2011 Plaintiff filed a medical negligence action in Bonneville County, Idaho naming EIRMC as a defendant. R., pp. 7-17. On January 24, 2011 Plaintiff filed a request for a prelitigation screening panel with the Idaho State Board of Medicine. Plaintiff made no attempt to serve EIRMC with a copy of the complaint and summons during the six month time period of January 20, 2011 to July 20, 2011. EIRMC's registered agent, CT Corporation System, was served with a copy of the Complaint and Summons in this matter on August 8, 2011. R., pp. 20; 27. CT Corporation System is clearly identified as EIRMC's registered agent on the Idaho Secretary of State website and CT Corporation System has been EIRMC's registered agent since December 17, 2001. R., pp. 29-30.

At the time Plaintiff filed his Complaint, this Court's decision of *Rudd v. Merritt*, 138 Idaho 526, 66 P.3d 230 (2003) was nearly eight (8) years old and was listed in the Notes of Decisions following both Idaho Code §§ 6-1005 and 6-1006 in the Idaho Code Annotated (in both the West and Michie editions of the Idaho Code) and was listed in the Judicial Decisions section following Rule 4(a) of the Idaho Rules of Civil Procedure in the West and Michie editions of the Idaho Court Rules. R., p. 76. Plaintiff did not move to enlarge the time in which

to serve defendants or seek a stay of this case until August 24, 2011, following the six month period of January 20, 11 – July 20, 2011 and following the filing and service of EIRMC's Motion to Dismiss and supporting documents on August 16, 2011. R., pp. 36-38.

II. ADDITIONAL ISSUE PRESENTED ON APPEAL

1. Is EIRMC entitled to attorney's fees and costs on appeal pursuant to Idaho Code § 12-121 and Rules 40 and 41 of the Idaho Appellate Rules?

III. ARGUMENT

This action is simply a matter of the Plaintiff failing to complete service of process on EIRMC within six months of filing his complaint. The district court's order and judgments granting EIRMC's Motion to Dismiss and dismissing EIRMC from this lawsuit should be affirmed pursuant to *Elliot v. Verska*, 152 Idaho 280, 271 P.3d 678 (2012), *Rudd v. Merritt*, 138 Idaho 526, 66 P.3d 230 (2003), Rule 4(a)(2) of the Idaho Rules of Civil Procedure, and other pertinent Idaho case law precedent, statutes, and rules cited below in this brief. In his appeal, Plaintiff has not sought reversal of the district court's finding and conclusion that the actions of the Plaintiff in this matter did not meet the good cause standard mandated by Rule 4(a)(2) of the Idaho Rules of Civil Procedure and he did not address the issue in his opening brief, thereby conceding that good cause was not shown in this matter.

Plaintiff's entire appeal hinges on three arguments: 1) The district court should have applied I.R.C.P. 6(b)'s excusable neglect standard instead of I.R.C.P. 4(a)(2)'s good cause standard; 2) Ignorance of the law and ignorance of procedural rules constitutes excusable neglect; or alternatively 3) A motion to stay *nunc pro tunc* is sufficient to avoid I.R.C.P. 4(a)(2)'s

time requirements for service of a summons and complaint and this Court's case law precedent set forth in *Rudd v. Merritt*, 138 Idaho 526, 66 P.3d 230 (2003) (which was recently relied on in part in *Elliot v. Verska*, 152 Idaho 280, 271 P.3d 678 (2012)) when such a motion is filed in a medical negligence action after the six month period of time to serve process has expired; when no attempt of service was made upon a defendant during the six (6) month period of time after the filing of a complaint; and after a defendant has made a motion to dismiss.

As will be detailed below, the district court was correct in applying I.R.C.P. 4(a)(2)'s good cause standard instead of I.R.C.P. 6(b)'s excusable neglect standard pursuant to Idaho case law precedent. In addition, even if an excusable neglect standard is examined this Court has repeatedly and consistently held that ignorance of the law and ignorance of procedural rules do not constitute excusable neglect. Further, the district court was correct in denying Plaintiff's motion for a stay *nunc pro tunc*, which was only filed after Plaintiff had failed to timely serve EIRMC, after Plaintiff had failed to make any attempt of service of EIRMC during the six (6) month period of time following the filing of his complaint, and after EIRMC had filed its motion to dismiss.

A. THE DISTRICT COURT WAS CORRECT IN APPLYING AND GRANTING EIRMC'S MOTION TO DISMISS PURUSANT TO I.R.C.P. 4(a)(2)'S "GOOD CAUSE" STANDARD BECAUSE THIS COURT HAS HELD THAT "GOOD CAUSE" IS THE APPLICABLE STANDARD WITH REGARD TO COMPLIANCE WITH I.R.C.P. 4(a)(2)'s REQUIREMENTS AND I.R.C.P. 4(a)(2) IS THE SPECIFIC RULE GOVERNING THE SERVICE OF A COMPLAINT AND SUMMONS.

1. I.R.C.P. 4(a)(2)'s good cause standard is the applicable standard to be employed in a case where a party has failed to serve process within the six (6) month time requirement imposed by said rule and reliance upon an excusable neglect standard is contrary to Idaho case law.

This Court discussed the applicable standard to be utilized where a party fails to comply with I.R.C.P. 4(a)(2)'s mandatory time requirements in *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 941 P.2d 314 (1997). This Court held:

> In their briefing before this Court, the [Plaintiffs] argue that we should consider "good cause" in Rule 4(a)(2) as synonymous with "excusable neglect." **Even if this were the applicable standard, we have held that ignorance of procedural requirements goes beyond excusable neglect**: "[A pro se litigant's f]ailure to be aware of the requirements of procedural rules does not constitute excusable neglect." *Golay*, 118 Idaho at 392, 797 P.2d at 100 (quoting lower court when discussing excusable neglect for purposes of I.R.C.P. 60(b)(1). Thus, even under this more relaxed standard, the [Plaintiffs'] pro se status does not excuse their failure to comply with the time limitations in Rule 4(a)(2).

Sammis v. Magnetek, Inc., 130 Idaho 342, 347, 941 P.2d 314, 319 (1997) (emphasis added).

As this Court recognized in *Sammis*, in cases where a plaintiff has failed to timely serve a party with a copy of the summons and complaint the applicable standard to be utilized is I.R.C.P. 4(a)(2)'s good cause standard and not an excusable neglect standard. Therefore, Plaintiff's contention that an excusable neglect standard should have been applied by the district court in this matter is without merit and contrary to this Court's statement in *Sammis*.

Plaintiff has conceded that he did not meet the good cause standard set forth in I.R.C.P. 4(a)(2) by failing to address or seek reversal of the district court's finding and conclusion that Plaintiff's actions in this matter did not meet the good cause standard of I.R.C.P. 4(a)(2). *Rowley v. Fuhrman*, 133 Idaho 105, 982 P.2d 940 (1999) ("The Fuhrmans did not list the threshold issue of waiver with respect to their statute of frauds defense as an issue on appeal pursuant to Idaho Appellate Rule 35(a)(4) or otherwise address the issue in their opening brief. The failure to include the waiver issue in their statement of issues or address the issue in their opening brief eliminates consideration of it on appeal." *Id.* at 106, 982 P.2d at 943 (citations omitted)). Accordingly, the district court's judgments dismissing EIRMC from this lawsuit should be affirmed.

2. With respect to the time limitations and requirements a plaintiff must comply with in order to serve a party with a copy of the summons and complaint and the burden that must be met when such time limitations are not satisfied, Rule 4(a)(2) of the Idaho Rules of Civil Procedure is a more specific rule than Rule 6(b) of the Idaho Rules of Civil Procedure and therefore the district court was correct in applying I.R.C.P. 4(a)(2) in this matter.

"A specific statute, and by analogy a specific rule of civil or criminal procedure, controls over a more general statute when there is any conflict between the two or when the general statute is vague or ambiguous." *Ausman v. State*, 124 Idaho 839, 842, 864 P.2d 1126, 1129 (1993).

> 'Where two statutes appear to apply to the same case or subject matter, the specific statute will control over the more general statute.' *Gooding County v. Wybenga*, 137 Idaho 201, 204, 46 P.3d 18, 21 (2002). Idaho Code § 6-803 is a general statute, while Idaho Code § 6-903(a) is a specific statute limiting the liability of governmental entities.

Athay v. Stacey, 146 Idaho 407, 419, 196 P.3d 325, 337 (2008).

Rule 4(a)(2) of the Idaho Rules of Civil Procedure states:

> If a service of the summons and complaint is not made upon a defendant within six (6) months after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with 14 days notice to such party or upon motion.

Rule 6(b) of the Idaho Rules of Civil Procedure states:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the parties, by written stipulation, which does not disturb the orderly dispatch of business or the convenience of the court, filed in the action, before or after the expiration of the specified period, may enlarge the period, or the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but the time may not be extended for taking any action under rules 50(b), 52(b), 59(b), (d), (e), and 60(b) except to the extent and under the conditions stated in them.

Based upon a plain reading of Rules 4(a)(2) and 6(b) of the Idaho Rules of Civil Procedure there can be no question that when it comes to the time requirements of serving a summons and complaint and the burden which must be met when the time requirements of serving a summons and complaint are not satisfied I.R.C.P. 4(a)(2) is the more specific rule. I.R.C.P. 4(a)(2) specifically states that a summons and complaint must be served within six (6) months of filing a complaint and that the action shall be dismissed if the party cannot show good cause why service was not made within the required time period. I.R.C.P. 6(b) is a general rule

which does not specifically address the service of a summons and complaint. This matter is analogous to this Court's reasoning in *Athay* cited above; I.R.C.P. 6(b) is a general rule while I.R.C.P. 4(a)(2) is a specific rule mandating that the good cause burden must be shown and met if a party fails to timely serve a copy of the summons and complaint.

Notably, Plaintiff does not cite to and EIRMC cannot find one (1) Idaho appellate case wherein either this Court or the Idaho Court of Appeals has applied an excusable neglect standard instead of the good cause standard imposed by I.R.C.P. 4(a)(2) when a party has failed to serve a summons and complaint within the six (6) month period of time mandated by I.R.C.P. 4(a)(2). *See Elliot v. Verska*, 152 Idaho 280, 271 P.3d 678 (2012); *Herrera v. Estay*, 146 Idaho 674, 201 P.3d 647 (2009); *Harrison v. Board of Professional Discipline of the Idaho State Board of Medicine*, 145 Idaho 179, 177 P.3d 393 (2008); *Campbell v. Reagan*, 144 Idaho 254, 159 P.3d 891 (2007); *Rudd v. Merritt*, 138 Idaho 526, 66 P.3d 230 (2003); *Martin v. Hoblit*, 133 Idaho 372, 987 P.2d 284 (1999); *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 941 P.2d 314 (1997). In fact, as cited above, this Court stated in *Sammis* that good cause not excusable neglect was the applicable standard to utilize in situations where a party has failed to timely serve a copy of his/her summons and complaint. *Sammis*, 130 Idaho at 347, 941 P.2d at 319 (1997).

Additionally, if a party failed to timely serve his/her summons and complaint and was then allowed to utilize an excusable neglect standard it would eviscerate and render meaningless the good cause standard and burden mandated by I.R.C.P. 4(a)(2). Under Plaintiff's reading of I.R.C.P. 4(a)(2) and 6(b) a party would never be required to show good cause why service was not timely made as long as he/she allowed the six (6) month period for service to expire and then

were able to show excusable neglect as to why service was not made. Such a reading would be illogical and contrary to Idaho law.

Further, Plaintiff's contention in his opening brief on page 13 that I.R.C.P. 4(a)(2) "is nothing more than a nonmandatory, nonjurisdictional, procedural rule" is false. This Court held in *Sammis* that "Rule 4(a)(2) is couched in **mandatory** language, requiring dismissal where a party does not comply, absent a showing of good cause." *Sammis*, 130 Idaho at 347, 941 P.2d at 319 (emphasis added). This Court has also noted that "[s]ervice of process is the due process procedure that vests a court with jurisdiction over a person, with the power to require such person to comply with the court's orders." *McGloon v. Gwynn*, 140 Idaho 727, 730, 100 P.3d 621, 624 (2004).

Based upon the foregoing, if a conflict can even be read between I.R.C.P. 4(a)(2) and I.R.C.P. 6(b) there is no question that I.R.C.P. 4(a)(2) is the more specific rule with respect to the time limitation in which a party is required to serve a summons and complaint and the burden that must be met to overcome the failure to comply with such time limitations. Consequently, the district court was correct in applying I.R.C.P. 4(a)(2)'s good cause standard in this matter, granting EIRMC's Motion to Dismiss, and dismissing EIRMC without prejudice. Therefore, EIRMC respectfully requests that the district court's order and judgments be affirmed.

B. EVEN IF EXCUSABLE NEGLECT IS EXAMINED IN THIS MATTER, WHICH IT SHOULD NOT, THIS COURT HAS REPEATEDLY AND CONSISTENTLY HELD THAT IGNORANCE OF THE LAW AND IGNORANCE OF PROCEDURAL RULES DOES NOT CONSTITUE EXCUSABLE NEGLECT.

As set forth above, the correct standard to be applied in this case is I.R.C.P. 4(a)(2)'s good cause standard, which the district court correctly applied. However, if this Court decides to undertake an excusable neglect analysis such a journey provides Plaintiff with no respite. Distilled to its essence, Plaintiff's claim of excusable neglect is that he was ignorant of the law and ignorant of procedural requirements ("That he was unaware of the outlier *Rudd* case should not be held against him"). R., p. 43. *Rudd* is not and has never been an outlier case. *Rudd* was issued in 2003 and has never been overturned, and in fact was recently relied upon in the *Elliot* case issued in January of this year. In addition, as pointed out in the statement of facts, *Rudd* is listed in the Notes of Decisions following both I.C. § 6-1005 and I.C. § 6-1006 in the Idaho Code Annotated in both the West and Michie versions of the Idaho Code and is listed in the Judicial Decisions section following Rule 4(a) in the Michie and West editions of the Idaho Court Rules. It is not as if the *Rudd* decision was hidden or issued decades ago.

Plaintiff relies primarily upon an Idaho Court of Appeals case from 1987, *Schraufnagel v. Quinowski*, 113 Idaho 753, 747 P.2d 775 (Ct. App. 1987), to support his contention that ignorance of the law and of procedural requirements constitutes excusable neglect. However, this Court and the Idaho Court of Appeals have repeatedly and consistently issued decisions post-1987 rejecting such an argument, with this Court holding in 1997: "ignorance of procedural requirements goes beyond excusable neglect". *Sammis*, 130 Idaho at 347, 941 P.2d at 319.

The facts, circumstances, and reasoning applied in the Idaho Court of Appeals case of *Washington Federal Savings and Loan Ass'n v. Transamerica Premier Ins. Co.*, 124 Idaho 913, 865 P.2d 1004 (Ct. App. 1993) is particularly instructive in the instant matter. In *Washington Federal*, a senior claims manager and assistant vice president for an insurance company untimely responded to a complaint and a default judgment was entered. *Id.* at 915, 865 P.2d at 1006. The district court granted a motion to set aside the default judgment, however, the Idaho Court of Appeals reversed. The insurance company, just like the Plaintiff in this case, attempted to rely upon *Schraufnagel*, which dealt with a pro se litigant failing to attend a hearing on a motion for summary judgment. The Idaho Court of Appeals reasoned:

> The record suggests two possibilities: either Mr. Forbes did not read the Idaho statute or he misinterpreted it. Either scenario presents a mistake of law. The traditional rule, expressed by our Supreme Court, is that a "mistake sufficient to warrant setting aside a default judgment must be of fact and not of law." *Hearst Corporation v. Keller*, 100 Idaho 10, 11, 592 P.2d 66, 67 (1979) *reversed on other grounds*, *Shelton v. Diamond International Corp.*, 108 Idaho at 938, 703 P.2d at 702. We observe that ignorance of the law or rules of procedure are generally inexcusable. *See* 11 C. WRIGHT, A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2858 P. 170 (1973). . . .
>
> . . .
>
> We find *Schraufnagel* to be inapposite. "The courts must weigh each case in light of its unique facts." *Johnson*, 104 Idaho at 732, 662 P.2d at 1176. Here, Mr. Forbes is not a pro se litigant and there was no confusion over conflicting documents, statutes or rules. There was only a misinterpretation of or an ignorance of Idaho law.

Id. at 917-18, 865 P.2d at 1008-09.

In this case, Plaintiff and his counsel either did not read I.R.C.P. 4(a)(2) and/or *Rudd v. Merritt*, 138 Idaho 526, 66 P.3d 230 (2003) or they misinterpreted the rule and case. In this case, Plaintiff was not a pro se litigant just as Mr. Forbes in *Washington Federal* was not a pro se litigant. At the time in question in this case Plaintiff was represented by two (2) law firms and at least three (3) attorneys. In this case, just as in *Washington Federal*, there was no confusion over statutes and rules. I.R.C.P. 4(a)(2) is a clear and unambiguous rule. The *Rudd* decision clearly interprets the applicability of I.R.C.P. 4(a)(2) to medical malpractice actions filed before or contemporaneously with a request for prelitigation proceedings. In this case, just as in *Washington Mutual*, there was only a misinterpretation of or an ignorance of Idaho law. Therefore, just as excusable neglect did not exist in the *Washington Federal* case, excusable neglect does not exist in this case.

This Court also held in *Golay v. Loomis*, 118 Idaho 387, 797 P.2d 95 (1990):

> Next we consider whether the magistrate erred by refusing to grant Loomis' motion for relief from the summary judgment pursuant to I.R.C.P. 60(b). Loomis alleges that any failure on his part to properly oppose the motion for summary judgment was excusable neglect or the result of a mistake. . . .
>
> We note initially that while Loomis appeared at the summary judgment hearing *pro se*, he may not request special consideration on that basis. "*Pro se* litigants are held to the same standards and rules as those represented by an attorney." (citations omitted). We agree with the district court's analysis of this issue as set forth in its decision denying Loomis' petition for rehearing.
>
> > The facts of the present case do not demonstrate excusable neglect as contemplated by I.R.C.P. 60(b)(1). The present case presents a situation more similar to that found in *Golden Condor*. ... *Golden Condor* dealt with a *pro se* litigant's failure to preserve an issue for appeal which precluded consideration of the issue on appeal. The Idaho Supreme Court noted:

> In all likelihood this result [failure to preserve issue for appeal] has come about due to appellant's lack of understanding of the procedural rules of law. Nevertheless, the failure to abide by such rules may not "be excused simply because [appellant was] appearing *pro se* and may not have been aware of the rule[s]." *Scafco Boise, Inc. v. Rigby*, 98 Idaho 432, 434, 566 P.2d 381, 383 (1977). *Pro se* litigants are held to the same standards and rules as those represented by an attorney. (citation omitted).

Golden Condor, Inc. v. Bell, [112 Idaho at 1089, n. 5, 739 P.2d at 388, n. 5] (1987).

The summary judgment entered against appellant in the present case was the result of his not being aware of the rules requiring verification of pleadings. **Failure to be aware of the requirements of procedural rules does not constitute excusable neglect**. Summary judgment having been properly entered and appellant having failed to show excusable neglect, the trial court properly denied appellant's motion to set aside the judgment under Rule 60(b).

Had the trial court affirmatively misled appellant as to the adequacy of his unverified answer prior to the hearing on the summary judgment motion, a different case would be presented. However, as stated, **appellant's failings**, as argued at summary judgment and on the motion to set aside, **were the result of appellant's lack of understanding of the procedural rules of law and, as such, do not constitute excusable neglect**.

We conclude that the district court's analysis of this case under I.R.C.P. 60(b) was not erroneous. The district court correctly stated and applied the standard for determining whether an I.R.C.P. 60(b) motion should have been granted by the magistrate court on the ground of alleged mistake or excusable neglect.

. . .

Accordingly, we reject Loomis's argument that his failure to abide by the summary judgment procedural rules may "be excused simply because [appellant was] appearing *pro se* and may not have been aware of the rule[s]." *Scafco Boise, Inc. v. Rigby*, 98 Idaho 432, 434, 566 P.2d 381, 383 (1977).

Golay v. Loomis, 118 Idaho 387, 391-93, 797 P.2d 95, 99-101 (1990) (emphasis added).

As set forth above, this Court's decisions of *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 941 P.2d 314 (1997); *Golay v. Loomis*, 118 Idaho 387, 797 P.2d 95 (1990); *Golden Condor, Inc. v. Bell*, 112 Idaho 1086, 739 P.2d 385 (1987); and the Idaho Court of Appeals decision of *Washington Federal Savings and Loan Ass'n v. Transamerica Premier Ins. Co.*, 124 Idaho 913, 865 P.2d 1004 (Ct. App. 1993) have all clearly held that not even a pro se litigant's failure to be aware of the requirements of procedural rules constitutes excusable neglect. If a pro se litigant's failure to be aware of procedural rules does not constitute excusable neglect then there can be no question that the Plaintiff in this matter (represented by two (2) law firms and at least three (3) attorneys) has not shown excusable neglect by their failure to be aware of I.R.C.P. 4(a)(2)'s time requirements and this Court's decision in *Rudd*, which delineates the applicability of I.R.C.P. 4(a)(2) when a medical malpractice action has been filed prior to or contemporaneously with a request for prelitigation proceedings.

Thus, even using an excusable neglect standard in this matter (which should not be used) Plaintiff's ignorance of the law and ignorance of procedural requirements does not meet such a standard. Accordingly, EIRMC would respectfully request that this Court affirm the order and judgments of the district court granting EIRMC's Motion to Dimsiss and dismissing EIRMC from the action.

C. PLAINTIFF FAILED TO TIMELY SERVE EIRMC IN THIS ACTION PURSUANT TO THIS COURT'S CASE LAW PRECEDENT FOUND IN *ELLIOT V. VERSKA*, 152 IDAHO 280, 271 P.3D 678 (2012) AND *RUDD V. MERRITT*, 138 IDAHO 526, 66 P.3D 230 (2003); THEREFORE THE DISTRICT COURT'S ORDER AND JUDGMENTS DISMISSING EIRMC SHOULD BE AFFIRMED.

The issue presented to this Court by Plaintiff (failing to serve a copy of the complaint and summons upon the defendants within six (6) months of filing a medical negligence action) is not new. In fact, this Court already examined and ruled on the issue of service in *Rudd v. Merritt*, 138 Idaho 526, 66 P.3d 230 (2003) and recently affirmed the *Rudd* decision in *Elliot v. Verska*, 152 Idaho 280, 271 P.3d 678 (2012).

In *Rudd*, the plaintiffs filed a medical negligence action in district court and filed a request for a pre-litigation screening panel on the same day. The plaintiffs in *Rudd* failed to serve the summons and complaint upon any defendant before the expiration of the six month period required by Rule 4(a)(2) of the Idaho Rules of Civil Procedure. *Id.* at 533, 66 P.3d at 236. Addressing the issue of a plaintiff filing a lawsuit before the completion of proceedings before a prelitigation screening panel this Court held:

> The Plaintiffs chose to file this lawsuit before the completion of the proceedings before the prelitigation screening panel. Having done so, they were required by Rule 4(a)(2) of the Idaho Rules of Civil Procedure to serve the summons and complaint upon the Defendants within six months. This Court first applied Rule 4(a)(2) in the *Sammis v. Magnetek* case. As stated by the district court in both of its order, "[I]t has been abundantly clear for quite awhile [sic] that the Rule will be applied strictly."

Rudd, 138 Idaho at 533, 66 P.3d at 237.

In *Elliot*, this Court cited to *Rudd* for the proposition that a plaintiff in a medical negligence case must serve the summons and complaint upon the defendants within six (6) months of filing a complaint as required by Rule 4(a)(2) of the Idaho Rules of Civil Procedure. *Elliot*, 152 Idaho at ___, 271 P.3d at 687. This Court also examined the good cause analysis under Rule 4(a)(2) of the Idaho Rules of Civil Procedure and held that pending proceedings before the prelitigation screening panel "are irrelevant to good cause." *Id.* This Court also noted that "[w]e have never held that service of process cannot be accomplished while a matter is pending before the prelitigation screening panel." *Id.*

Just as the plaintiffs in *Rudd* chose to file their lawsuit before the completion of the prelitigation screening panel proceedings, the Plaintiff in this matter chose to file his lawsuit before completion of the proceedings before the prelitigation screening panel. Having done so, Plaintiff was required by Rule 4(a)(2) of the Idaho Rules of Civil Procedure, *Rudd*, and now *Elliot* to serve EIRMC within six (6) months of filing his complaint. As this Court noted in *Elliot*, it has never held that service of process cannot be accomplished while a matter is pending before the prelitigation screening panel. Plaintiff failed to make any attempt of service upon EIRMC in the six (6) months following the filing of his complaint. Subsequently, Plaintiff attempted untimely service upon EIRMC. Accordingly, the district court's order granting EIRMC's Motion to Dismiss and judgments dismissing EIRMC from this action should be affirmed.

D. THE DISTRICT COURT WAS CORRECT TO DENY PLAINTIFF'S MOTION FOR A STAY WHERE SUCH STAY WAS NOT REQUESTED UNTIL AFTER THE TIME HAD EXPIRED FOR SERVING EIRMC WITH PROCESS IN THIS MATTER AND ONLY REQUESTED AFTER EIRMC HAD FILED ITS MOTION TO DISMISS.

Plaintiff's entire stay argument is moot and illusory. The record in this case is undisputed that Plaintiff did not request a stay in this matter until more than seven (7) months had elapsed from the time of the filing of his complaint. By the time Plaintiff requested a stay the six (6) month period in which to serve EIRMC with process had expired, EIRMC had filed a motion to dismiss, and this Court's decision in *Rudd* had been brought to Plaintiff's attention. Plaintiff in this case is in the very same position the plaintiffs in *Rudd* found themselves, which is they did not timely seek a stay (the *Rudd* plaintiffs never sought a stay while the plaintiff in this case only sought a stay after his service time had expired and *Rudd* was brought to his attention).

Entering a stay *nunc pro tunc* in this matter would render I.R.C.P. 4(a)(2), *Rudd*, and *Elliot* null and void and reward Plaintiff's ignorance of the law and failure to follow and take advantage of the tolling of the statute of limitations as found in Idaho Code § 6-1005. In sum, Plaintiff cannot be allowed to file this litigation and then attempt to seek some sort of protection from a statute (and a process) that he ignored and circumvented in the first place.

1. Granting a stay *nunc pro tunc* in this matter would render I.R.C.P. 4(a)(2), *Rudd*, and *Elliot* null and void and reward Plaintiff's ignorance of the law.

Idaho Code § 6-1005 states in pertinent part:

> . . . the applicable statute of limitations shall be tolled and not deemed to run during the time that such a claim is pending before such a panel . . .

Plaintiff could have filed a request for a prelitigation screening panel, which would have

tolled the statute of limitations on his claim and then filed his claim following the conclusion of the prelitigation screening panel proceedings. However, Plaintiff chose to ignore and circumvent the tolling provisions of I.C. § 6-1005 and filed this lawsuit before the completion of the proceedings before the prelitigation screening panel. "Having done so, they were required by Rule 4(a)(2) of the Idaho Rules of Civil Procedure to serve the summons and complaint upon the Defendants within six months." *Rudd*, 138 Idaho at 533, 66 P.3d at 237.

If the Plaintiff in this matter were granted a stay *nunc pro tunc* the precedent that would be set would be that a plaintiff could file a medical negligence action in court prior to the completion of the prelitigation screening panel process, wait an indeterminate amount of time from the time the complaint was filed to serve the summons and complaint, serve the summons and complaint upon a defendant even a year after filing the complaint, and then seek a stay *nunc pro tunc* to avoid the mandates of I.R.C.P. 4(a)(2). In such a world there would be no certainty for courts or defendants. Medical negligence actions could be filed and then just sit indeterminately clogging court dockets and giving medical providers no certainty as to the status of cases until a plaintiff would one day serve the lawsuit knowing that if the matter was served untimely all he or she would have to do would be to request a stay *nunc pro tunc* to avoid any time requirements for service.

Granting a stay *nunc pro tunc* would effectively render Rule 4(a)(2) of the Idaho Rules of Civil Procedure meaningless in a medical negligence case and would overturn this Court's decisions of *Elliot v. Verska*, 152 Idaho 280, 271 P.3d 678 (2012) and *Rudd v. Merritt*, 138 Idaho 526, 66 P.3d 230 (2003). In addition, granting such a stay would reward Plaintiff for not taking

advantage of the tolling provision of I.C. § 6-1005 and also reward Plaintiff's ignorance of the *Rudd* decision. Accordingly, EIRMC would respectfully request that this Court affirm the district court's denial of Plaintiff's request for a stay *nunc pro tunc* in this matter.

2. A stay pursuant to Idaho Code § 6-1006 in this matter is irrelevant because Plaintiff already commenced the litigation by filing his complaint and nothing prohibited Plaintiff from serving EIRMC during the pendency of the prelitigation panel proceedings in this matter.

A stay pursuant to Idaho Code § 6-1006 is irrelevant to the present matter because Plaintiff did not request a stay until faced with a motion to dismiss over seven (7) months after he filed his complaint. At the time EIRMC filed its Motion to Dismiss, Plaintiff and the plaintiffs in *Rudd* were in the same exact position. In neither case was a stay requested. In addition, there is no dispute that Plaintiff did not request a stay in the court proceedings in the six months following the filing of his complaint. This Court recently stated that "[w]e have never held that service of process cannot be accomplished while a matter is pending before the prelitigation screening panel." *Elliot*, 152 Idaho at ___, 271 P.3d at 687. Consequently, there is no valid reason why Plaintiff did not serve EIRMC with a copy of the summons and complaint in this matter in the six (6) months following the filing of his complaint because it is undisputed there was no stay in place, no stay had been requested, and no decision from this Court stating that service could not be accomplished during the pendency of the prelitigation screening panel. Therefore, Plaintiff's contention that a stay should toll I.R.C.P. 4(a)(2)'s service deadline is irrelevant, illusory, and has no bearing in this matter because no stay was ever requested or entered during the applicable time period following the filing of the complaint.

Even though this Court need not determine the issue of whether a stay issued pursuant to Idaho Code § 6-1006 would justify failing to serve the summons and complaint while that stay was in effect if the Court is so inclined to rule on said issue, EIRMC would request that this Court rule any such stay would not justify failing to serve the summons and complaint while that stay was in effect. This Court held in *Moss v. Bjornson*, 115 Idaho 165, 167, 765 P.2d 676, 678 (1988):

> Thus, under I.C. § 6-1006, the district court is vested with authority to stay civil proceedings until the prelitigation screening panel renders its advisory opinion. As a result, while filing with the screening panel is a condition precedent to *proceeding* with district court litigation, such as filing interrogatories or setting trial dates, it is not a condition precedent to filing an action in order to toll the statute of limitations.

The purpose of a stay as implied in *Moss* is to prevent discovery from proceeding in a case and otherwise stop the progression of a filed case to trial during the prelitigation screening process. A case can only progress towards trial if the plaintiff has served the defendant with the lawsuit. A stay should not become a means to lengthen the time in which a complaint and summons can be served upon a defendant; the legislature has already provided a mechanism for claimants by way of I.C. § 6-1005 to toll the statute of limitations on medical negligence actions so that a claimant does not even have to file an action (let alone serve a lawsuit) until the prelitigation screening panel proceedings have concluded.

If a claimant/plaintiff chooses to ignore the provisions of I.C. § 6-1005 and file an action in court contemporaneously with or while the prelitigation screening panel process is pending he/she should be required to comply with Rule 4(a)(2) of the Idaho Rules of Civil Procedure and

serve the matter within six (6) months of filing a complaint. *See Elliot v. Verska*, 152 Idaho 280, 271 P.3d 678 (2012); *Rudd v. Merritt*, 138 Idaho 526, 66 P.3d 230 (2003). This Court has "never held that service of process cannot be accomplished while a matter is pending before the prelitigation screening panel." *Elliot v. Verska*, 152 Idaho 280, ___, 271 P.3d 678, 687 (2012). Therefore, EIRMC would respectfully request that this Court rule that a stay issued pursuant to I.C. § 6-1006 does not stay the time in which to serve the summons and complaint while such stay is in effect. Accordingly, EIRMC requests that this Court affirm the district court's decision granting EIRMC's Motion to Dismiss, denying Plaintiff's Cross-Motion to Stay Case *Nunc Pro Tunc* or Motion to Enlarge Time to Serve Defendants, and uphold the judgments dismissing EIRMC in this matter.

E. EIRMC IS ENTITLED TO ATTORNEY'S FEES AND COSTS ON APPEAL PURSUANT TO IDAHO CODE § 12-121 AND RULES 40 AND 41 OF THE IDAHO APPELLATE RULES; PLAINTIFF IS NOT ENTITLED TO ATTORNEY'S FEES AND COSTS ON APPEAL.

This Court has held that a party is "entitled to attorney fees on appeal pursuant to I.C. § 12-121 if this Court is left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably, and without foundation." *Rowley v. Fuhrman*, 133 Idaho 105, 109-110, 982 P.2d 940, 944 (1999). In this case, Plaintiff has conceded that he did not meet the good cause standard mandated by I.R.C.P. 4(a)(2). Plaintiff has argued that the district court should have applied an excusable neglect standard instead of a good cause standard even though this Court stated in *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 347, 941 P.2d 314, 319 (1997) that good cause, not excusable neglect, is the standard to be applied in cases where a summons and

complaint have been untimely served. Plaintiff failed to cite to one (1) Idaho appellate case where an excusable neglect standard was utilized instead of a good cause standard where the issue of untimely service was involved. Plaintiff has also argued that his ignorance of procedural requirements and ignorance of the law constitutes excusable neglect even though this Court and the Court of Appeals have repeatedly held that ignorance of the law and ignorance of procedural requirements do not constitute excusable neglect.

In addition, Plaintiff has argued that he should have been granted a stay *nunc pro tunc* even though he, like the plaintiffs in *Rudd*, did not request a stay during the six (6) months following the filing of his complaint and did not request such a stay until after EIRMC had filed its Motion to Dismiss. In sum, Plaintiff's appeal was brought and pursued frivolously, unreasonably, and without foundation. Consequently, EIRMC is entitled to its attorney's fees and costs on appeal.

Plaintiff has sought attorney's fees and costs in his opening appellate brief. However, Plaintiff has not enunciated how EIRMC defended this matter frivolously, unreasonably, and without foundation. In fact, EIRMC defended this case and the present appeal on the basis of this Court's case law precedent set forth in *Elliot v. Verska*, 152 Idaho 280, 271 P.3d 678 (2012), *Rudd v. Merritt*, 138 Idaho 526, 66 P.3d 230 (2003), Rule 4(a)(2) of the Idaho Rules of Civil Procedure, and this Court's and the Idaho Court of Appeals' case law discussing and interpreting good cause and excusable neglect. Accordingly, Plaintiff's request for attorney's fees and costs should be denied.

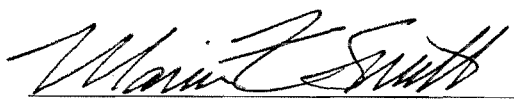
IV. CONCLUSION

Plaintiff chose to file an action in court prior to filing a request for prelitigation screening panel proceedings even though he was not required to do so pursuant to Idaho Code § 6-1005. Having chosen to file his complaint in court and disregard the protections of I.C. § 6-1005 Plaintiff was required to serve EIRMC with a copy of the summons and complaint within six (6) months of filing said complaint. Plaintiff failed to timely serve EIRMC and admitted to being ignorant and unaware of the *Rudd* decision. Plaintiff's disregard and ignorance of Idaho law and Idaho procedural requirements should not be rewarded on appeal.

Accordingly, EIRMC respectfully requests that this Court affirm the district court's order granting EIRMC's Motion to Dismiss and denying Plaintiff's Motion to Stay Case *Nunc Pro Tunc* or, Alternatively, to Enlarge Time to Serve Defendants and uphold the district court's judgments dismissing EIRMC from this matter. In addition, EIRMC requests that this Court award it attorney's fees and costs on appeal.

DATED this 31 day of August, 2012.

SMITH & BANKS, PLLC



For: MARVIN M. SMITH

CERTIFICATE OF SERVICE

I hereby certify that I served two (2) true and correct copies of the foregoing document upon the following this 31 day of August, 2012, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Reed W. Larsen
COOPER & LARSEN
P.O. Box 4229
Pocatello, ID 83205-4229

[✓] U.S. Mail, postage prepaid
[ ] Hand Delivery
[ ] Fax 235-1182
[ ] Overnight Mail

David M. Kono
Daniel K. Brough
BENNETT TUELLER JOHNSON & DEERE
3165 E. Millrock Drive, Ste. 500
Salt Lake City, UT 84121

[✓] U.S. Mail, postage prepaid
[ ] Hand Delivery
[ ] Fax 801-438-2050
[ ] Overnight Mail

J. Michael Wheiler
THOMSEN STEPHENS
2635 Channing Way
Idaho Falls, ID 83404

[✓] U.S. Mail, postage prepaid
[ ] Hand Delivery
[ ] Fax 522-1277
[ ] Overnight Mail

Gregory C. Calder
BEARD ST. CLAIR GAFFNEY
2105 Coronado Street
Idaho Falls, ID 83404

[✓] U.S. Mail, postage prepaid
[ ] Hand Delivery
[ ] Fax 529-9732
[ ] Overnight Mail

For: Marvin M. Smith